NOT DESIGNATED FOR PUBLICATION

DIVISION III

CA 06-1264

MAY 23, 2007

KENNETH L. BOONE, JR.
APPELLANT

V.

ARKADELPHIA SHEET METAL and
STATE FARM INSURANCE
COMPANY
APPELLEES

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
[NO. F305411]

REVERSED AND REMANDED

Appellant Kenneth Boone, Jr. appeals the denial of additional benefits by the Workers' Compensation Commission in his claim against appellee Arkadelphia Sheet Metal. He obtained a favorable ruling from the administrative law judge (ALJ), who awarded him additional medical benefits as reasonable and necessary and not subject to the change-of-physician rules, a seven-percent permanent partial impairment rating, and a twenty-five percent loss in wage earning capacity. The employer appealed, and the Commission reversed the ALJ's award, finding that appellant's additional treatment was unauthorized and unreasonable, and further that appellant suffered no compensable permanent partial disability, rendering moot any question of wage loss. Appellant contends that the Commission's decision lacks substantial evidence to support its conclusion. We agree, necessitating that we reverse and remand for further proceedings consistent with this opinion.

To explain in more detail, appellant, a man in his twenties, suffered an admittedly work-related injury on May 15, 2003, while carrying a heating/air-conditioning unit with the help of three other employees. Appellant stepped backward and felt his back pop. He experienced back pain and right leg and testicle pain. The injury was immediately reported, and appellant rested in the van the remainder of that work day. Because he did not improve, appellant presented to the emergency room on May 19, where he underwent plain lumbar x-rays and was given pain medication. He was directed to his family physician to treat a low-back strain.

Appellant presented to family physician Dr. Blackmon, who ordered an MRI. He was then sent to an orthopedic specialist, Dr. Wilson, on June 30. Dr. Wilson stated that the studies revealed bulging discs at L4-5 and L5-S1 on the right. Dr. Wilson treated him with medication and directed him to do home exercises. Because the pain persisted, by late July 2003, Dr. Wilson ordered three series of steroid injections over the next few months, which gave him temporary relief. A myelogram performed in November 2003 showed a mild protrusion at L4-5 and minimal posterior osteophyte at L5-S1. After this round of conservative treatment, Dr. Wilson released appellant to work on December 1, 2003. Dr. Wilson described the injury as a lumbosacral strain that was slow to heal, though he did tell appellant to return if he experienced an exacerbation of pain.

Appellant did experience ongoing pain, so he formally requested a change of physician, which was granted by the Commission on January 7, 2004, for him to see Dr. Sprinkle. Dr. Sprinkle, a physician specializing in non-operative care of the spine, saw appellant in late

January 2004, noting that appellant had mild disc herniation at L4-5 and L5-S1. Dr. Sprinkle ordered an EMG study, which showed no nerve abnormalities, and gave him a prescription for Bextra. In a follow-up visit in February 2004, Dr. Sprinkle opined that appellant did not need surgery, and given his previous conservative treatment, he thought a TENS unit would be helpful. In a March 2004 follow-up visit, Dr. Sprinkle tried a trigger-point injection that produced mild relief, switched him to Mobic medication, and urged him to try the TENS unit. In April 2004, Dr. Sprinkle discontinued the oral medication and noted that appellant reported that the TENS unit helped. Dr. Sprinkle recommended that appellant continue home exercises, gave him another medication (Neurontin), and continued the TENS unit.

By May 2004, appellant did not think he was getting any better, and apparently conflict arose between him and Dr. Sprinkle. Appellant attributed this discord to his suggestion of alternative tests and treatments because thus far Dr. Sprinkle's treatment was ineffective. Regarding the last office visit on May 19, 2004, Dr. Sprinkle wrote that appellant accused him of not having any concern for the patient's well being, and that because of their discord, he (the doctor) did not feel comfortable continuing their relationship. This office-visit note remarked that appellant should continue Neurontin for symptom relief for up to three more months, that he continue his home exercises, but that "I do not have anything else further to offer." The insurance company continued to pay for the TENS unit, which appellant continued to use. Appellant tried to return to Dr. Sprinkle but was refused.

Appellant went on his own to another family doctor, Dr. Taylor, who referred him to neurosurgeon Dr. Schlesinger. He saw the neurosurgeon in late October 2004. Dr. Schlesinger noted that there was an early MRI done in June 2003 concerning protrusion and bulging at L4-5 and L5-S1, whereupon a new MRI and x-rays were ordered. The x-rays were unremarkable, but the MRI in November 2004 showed the disc bulge at L4-5 along with an annular tear, and a small herniation at L5-S1, accompanied by degenerative changes at both levels. There was also a neurenteric cyst "of doubtful clinical significance."

Appellant attempted to return to Dr. Sprinkle with the new MRI, but Dr. Sprinkle refused to see him. He contacted the claims adjuster in December 2004 to get approval to see Dr. Schlesinger but he was refused. Dr. Sprinkle responded to the insurance adjuster that he agreed with Dr. Schlesinger that there was nothing to offer surgically, and that "everything that can be done [h]as been done thus far."

In March 2005, Dr. Sprinkle was asked to review Dr. Schlesinger's opinion and plan, and Dr. Sprinkle agreed that in June 2003 the MRI showed mild degenerative changes at L4-5 and L5-S1 with herniation at L4-5 and bulging at L5-S1, and that the new MRI added the annular tear and frank herniation at L5-S1. Dr. Sprinkle said that "my recommendation with this new information would be that this patient certainly should follow up with Dr. Schlesinger. I am really a little unclear why he has not done that already[.]"

Appellant saw Dr. Schlesinger again in May 2005, and the doctor prescribed a home traction unit and recommended that he undergo a functional capacity evaluation after a month

of traction use because "he has just about reached maximum medical improvement." The insurance adjuster would not approve the traction unit or the evaluation.

Appellant paid for an independent medical evaluation conducted in December 2005 by Dr. Moore, another neurosurgeon, who agreed that he needed a traction unit, that he needed another diagnostic test, that "whether or not he is a surgical candidate is yet to be conjectured," and that he was fifteen percent permanently partially impaired.

On this evidence, the ALJ awarded appellant the benefits he contended were due him, with the exception of lowering the impairment rating to seven percent based upon the ALJ's interpretation of the AMA Guides regarding impairment. On appeal, the Commission found that appellant sought unauthorized care after being released by Dr. Sprinkle; that there was no controversion to abrogate the change-of-physician rules; that Dr. Sprinkle's concurrence with Dr. Schlesinger's treatment was not a valid referral; and that any further treatment was not reasonable or necessary because it was unrelated to his work injury but was for new findings on the MRI that were not apparent in May 2003. Therefore, any treatment from and after May 19, 2004, was determined to be non-compensable. This resulted in the Commission rejecting the claim for permanent partial impairment. Because any wage-loss disability was dependent upon there being a valid permanent partial impairment rating, the Commission did not address it as having been rendered moot. Appellant filed the present appeal with our court.

The court of appeals reviews decisions of the Workers' Compensation Commission to determine whether there is substantial evidence to support it. *Rice v. Georgia-Pacific Corp.*,

72 Ark. App. 149, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if its findings are supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The issue is not whether we might have reached a different decision or whether the evidence would have supported a contrary finding; instead, we affirm if reasonable minds could have reached the conclusion rendered by the Commission. *Sharp County Sheriff's Dep't v. Ozark Acres Improvement Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001). It is the Commission's province to weigh the evidence and determine what is most credible. *Minn. Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). These rules insulate the Commission from judicial review and properly so, as it is a specialist in this areas and this court is not; however, they do not provide a total insulation because that would render the appellate court's function in reviewing these cases meaningless. *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999).

In his first three points on appeal, appellant argues that the Commission erred when it found that his healing period for his work injury ended when he was discharged from Dr. Sprinkle's care on May 19, 2004; that appellant was subject to change-of-physician rules that he did not abide; that Dr. Sprinkle did not in fact refer him to Dr. Schlesinger; and that he had not proven by a preponderance that he had need for additional medical treatment for his

compensable work injury. Appellant contends that the Commission's opinion lacks substantial evidence to support those conclusions, and we must agree.

Arkansas Code Annotated section 11-9-508(a) (Repl. 2002) provides in relevant part that "the employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic . . . and nursing services and medicine . . . as may be reasonably necessary in connection with the injury received by the employee." Subsection (b) states that:

> If the employer fails to provide the medical services set out in subsection (a) of this section within a reasonable time after knowledge of the injury, the Workers' Compensation Commission may direct that the injured employee obtain the medical service at the expense of the employer, and any emergency treatment afforded the injured employee shall be at the expense of the employer. In no circumstance may an employee, his or her family, or dependents, be billed or charged for any portion of the cost of providing the benefits to which he or she is entitled under this chapter.

What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission. *Hamilton v. Gregory Trucking*, __ Ark. App. __ , __ S.W.3d __ (Nov. 16, 2005). It must be remembered that while the Commission is free to weigh the medical evidence, it cannot arbitrarily disregard medical evidence. *See Patchell v. Wal-Mart Stores*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). Furthermore, a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *See Patchell v. Wal-Mart Stores, Inc.*, __ Ark. App. __, __ S.W.3d __ (May 19, 2004); *Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Here, appellant undoubtedly suffers from chronic pain associated with his low-back injury at work in 2003. While multiple methods of conservative treatment have not eliminated his pain and he is not a surgical candidate at this point, continuation of the TENS unit has never been contested and further pain-management methods have been recommended.

Dr. Schlesinger assigned the cyst little to no clinical significance. As to the annular tear found in November 2004, at the L4-5 level, there is no evidence that this is anything other than a natural consequence of his work-related herniation at that level. Appellant had not worked at all since his injury on the job, and there was no evidence, and certainly no substantial evidence, to support that some intervening event caused the annular tear. In short, appellant's chronic pain stemmed from his unresolved work injury, there is no substantial evidence to find otherwise, and all the doctors agree that appellant suffers from a low-back injury that has, at best, been slow to heal.

Therefore, we hold that the Commission's conclusion that appellant is not entitled to additional medical treatment is not supported by substantial evidence. In addition, we are convinced that reasonable persons could not find that there was not a referral by his authorized treating physician, Dr. Sprinkle, to Dr. Schlesinger. Clearly, Dr. Sprinkle dismissed appellant from his care due to personal issues but continued his prescription for Neurontin and for the TENS unit to manage his pain. After appellant went on his own to Dr. Schlesinger and unsuccessfully tried to go back to Dr. Sprinkle, Dr. Sprinkle wrote that appellant should see

Dr. Schlesinger for follow up, which appellant did. There was no need to seek a change of physician, because Dr. Sprinkle effectively sent appellant on to Schlesinger.

The Commission did not make any findings on permanent impairment when it determined that any further care was unwarranted and that any rating must have been based upon a new injury unrelated to his work injury. We believe that the Commission should, upon remand, determine whether the issue of permanent impairment is ripe for consideration, and if so, whether appellant suffered from any such impairment.

The issue of wage loss is wholly dependent upon the resolution of the issue of permanent impairment. The Commission did not reach this issue either, because it was rendered moot by the failure to award any permanent impairment. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000); *Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996). Any discussion of wage loss is premature at this juncture, and therefore, we do not discuss it herein.

Reversed and remanded.

HART and GLADWIN, JJ., agree.